PRP 405539

NO. 35186-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ROBIN TAYLOR SCHREIBER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.04-1-01663-1

SUPPLEMENTAL BRIEF OF RESPONDENT
RE: COGGIN AND SPEIGHT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. PROCEDURAL HISTORY

This Court imposed a stay in this case, pending the Supreme Court's consideration of the personal restraint petitions in *In re Personal Restraint of Coggin*, ___Wn.2d___, 340 P.3d 810 (December 11, 2014) and *In re Personal Restraint of Speight*, ___Wn.2d___, 340 P.3d 207 (December 11, 2014). Like Schreiber, *Coggin* and *Speight* both brought timely personal restraint petitions claiming violation of the right to a public trial based on the questioning of some jurors in chambers during voir dire without the trial court having conducted a formal hearing under *Bone-Club*. Like Schreiber, neither petitioner raised the claim that he was denied effective assistance of appellate counsel. Like Schreiber, both petitioners claimed they should be relieved of the burden to demonstrate actual and substantial prejudice when asserting a violation of the right to a public trial, but such error, if found to exist, is treated as structural error on direct appeal. The Supreme Court has now issued its opinions in these cases, and this Court has lifted the stay in this case and requested supplemental briefing.

B. ARGUMENT

I. SCHREIBER MUST SHOW ACTUAL AND SUBSTANTIAL PREJUDICE, WHICH HE CANNOT DO.

The ruling of the Supreme Court in these cases is that a personal restraint petitioner claiming a violation of his right to a public trial must still demonstrate actual and substantial prejudice. That was the narrowest reasoning adopted by a majority of the justices. Schreiber's claim otherwise is meritless.

Four justices signed the lead opinions in *Coggin* and *Speight*, holding that a personal restraint petitioner claiming a violation of his right to a public trial must demonstrate actual and substantial prejudice despite the fact that the error in question would be treated as structural on direct appeal. *Coggin* at 812-13, *Speight* at 209. Justice Madsen filed a concurring opinion in which she held that both defendants should be denied relief because they invited the closures in question, and, in *Speight*, she held that the Court should have first considered whether the public trial right attaches to motions in limine before reaching the prejudice question on that part of the claim. Justice Madsen agreed with the reasoning and holding of the lead opinions insofar as they held that the petitioners must show actual and substantial prejudice in order to gain

relief, and that neither petitioner had done so. The salient quotations from each opinion are copied below:

> The lead opinion holds that petitioners must show actual and substantial prejudice when raising a public trial right violation for the first time on collateral review. Lead opinion at 811. I agree with the lead opinion's decision to deny William Coggin's personal restraint petition. However, I would instead hold that Coggin invited the courtroom closure during voir dire and accordingly is precluded from raising the issue on collateral review. Thus, we need not reach the question of actual and substantial prejudice.
>
> Nevertheless, because guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in *State v. Bone–Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), requires a petitioner in a personal restraint petition to prove prejudice unless he can demonstrate that the error in his case "'infect[ed] the entire trial process'" and deprive the defendant of "'basic protections,'" without which "'no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 36 (1999) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Rose v. Clark*, 478 U.S. 570, 577, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

Coggin at 814.

> Like in the companion case, *In re Personal Restraint of Coggin*, No. 89694–1, —— Wash. 2d ——, —— P.3d —— (Wash. Dec. 11, 2014), I agree with the lead opinion's decision to deny Roland Speight's personal restraint petition, but for different reasons. First, I believe that this court must decide whether motions in limine implicate the public trial right, and I would decide this question in the negative. Second, I would hold that Mr. Speight invited the judge to conduct portions of voir dire in chambers. Thus, in contrast to the lead opinion and in line with my concurrence in Coggin, I believe we need not determine the prejudice showing required of personal restraint petitioners.

> Nevertheless, because guidance is needed I would agree with the majority that the error here, failure to engage in the analysis outlined in *State v. Bone–Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), requires a petitioner in a personal restraint petition to prove prejudice unless he can demonstrate that the error in his case "'infect[ed] the entire trial process'" and deprive the defendant of "'basic protections,'" without which "'no criminal punishment may be regarded as fundamentally fair.'" *Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 36 (1999) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Rose v. Clark*, 478 U.S. 570, 577, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

Speight at 209.

Thus, the narrowest ground on which a majority of the justices agreed was that a petitioner claiming a violation of the right to a public trial must demonstrate actual and substantial prejudice, and that neither petitioner had done so.

Schreiber takes the position that the opinions of the Court in *Coggin* and *Speight* have no precedential value. He argues that the "narrowest" point of agreement between the five justices was that the petitions should be denied. In reaching this conclusion he purports to apply the *Marks* rule, but his argument misunderstands the rule (or deliberately obfuscates it to suit his purpose). The purpose of the *Marks* rule is to look for a point of consensus in reasoning, not merely discerning the bare result in that particular case. In *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 90 (1977), the Supreme Court announced a rule that was

intended to assist lower courts in interpreting plurality opinions. The rule is that "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks* at 193, quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909 (1976). The adoption of the rule shows that the Court had no intention of simply creating "throwaway" opinions designed to provide relief solely to the litigant in a particular case. Indeed, the highest court in the land, like the highest court of each state, can take action to provide relief to a particular litigant without hearing oral argument and issuing a formal opinion--if all it were interested in were providing relief to that particular litigant.

One commentator has observed that there are two predominant constructions of the *Marks* rule: The implicit consensus approach and the predictive approach (what this commentator refers to as the "fifth-vote" approach). John P. Neuenkirchen, *Plurality Decisions, Implicit Consensus, and the Fifth-Vote Rule under Marks v. United States*, 19 Widener L. Rev. 387 (2013). Neuenkirchen describes the implicit consensus rule this way:

> The implicit consensus approach only recognizes a *Marks* holding in cases if the narrowest concurring opinion is a logical subset of the broader concurring opinion. In other words, a Marks holding exists only where there is implicit agreement between the various positions expressed by the concurring Justices in a plurality decision, even though some Justices would extend the reasoning further than the Justices who expressed a narrower position

Neuenkirchen at 388.

Describing the predictive approach, Neuenkirchen explains:

> The second approach is the fifth-vote rule, which is also called the predictive approach. This approach treats the position expressed by the Justice whose vote was necessary to secure a majority in a plurality decision as the controlling opinion under *Marks*. Put differently, the Justice that provided the fifth vote in a decision describes the holding in the case because that Justice's position best describes how the Court would handle similar factual scenarios in subsequent cases involving the same issues raised in the plurality decision.

Neuenkirchen at 388.

It is not entirely clear to the State which of these applications Washington follows. In *State v. Hickman*, 157 Wn.App. 767, 238 P.3d 1240, this Court was charged with interpreting the United States Supreme Court's opinion in *Missouri v. Siebert*, 542 U.S. 600, 124 S.Ct. 2601 (2004). In *Siebert*, four justices held that a two-step interrogation technique in which the police obtain an initial, un-*Mirandized* statement from a defendant, and then offer *Miranda* warnings and take a subsequent *Mirandized* statement, the taking of the second *Mirandized* statement violates the Fifth Amendment. The Court observed that the "manifest purpose" of the two-step technique is "to get a confession the suspect would not make if he understood his rights at the outset." *Seibert*, Souter, J., at 613. Justice Kennedy concurred with the four justices in

disapproving of the two-step interrogation technique, but wrote, in a concurring opinion, that the government should still be able to use such a confession if the State could demonstrate that the two-step technique was not deliberately employed to violate a suspect's Fifth Amendment rights and that curative measures were taken before the post-warning statements were made. *Siebert* at 622, Kennedy, J., concurring.

This Court agreed with the Ninth Circuit's opinion in *United States v. Williams,* 435 F.3d 1148 (9th Cir. 2006), and held the Kennedy concurrence represented the majority opinion of the Court. *Hickman* at 774. In so holding, this Court reiterated the principle outlined in *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682 (3d.Cir. 1991), *aff'd in part and reversed in part on other grounds,* 505 U.S. 833, 112 S.Ct. 2791 (1992), that the *Marks* rule looks to discern the "'legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" *Hickman* at 774, quoting *Casey* at 693.

Under either application of the plurality opinions in *Coggin* and *Speight*, it is clear that the narrowest legal standard on which a majority of the justices agreed was that a personal restraint petitioner must show actual and substantial prejudice when alleging a constitutional violation, even where the error would be deemed structural on direct appeal. Justice

Madsen's opinion, as noted above, merely held that in each of these cases, the petitioner's invited the closures and, in *Speight*, that the Court should have decided whether motions in limine even implicate the public trial right before reaching the merits of the claim. But there can be no question that if these petitioners had not invited the errors they now complained of, and if the Court had previously ruled that the public trial right was implicated in motions in limine, Justice Madsen would agree that the petitioners would still have been required to demonstrate actual and substantial prejudice even where the error complained of is regarded as structural on direct appeal. These opinions are not throwaway opinions, as Schreiber would have this Court hold. The rule announced in *Coggin* and *Speight* is that a personal restraint petitioner alleging a violation of his right to a public trial must demonstrate actual and substantial prejudice in order to obtain relief. As the State argued extensively in its prior briefing in this personal restraint action, Schreiber cannot show actual and substantial prejudice from the very brief questioning of two jurors in chambers conducted by his lawyer, nor has he even attempted to do so. His claim must fail.

II. THE FEDERAL CONSTITUTION DOES NOT PROVIDE RELIEF FOR SCHREIBER.

Schreiber contends that he is entitled to relief under the United States Constitution. He argues that under the Sixth Amendment, an error that would be deemed structural on direct review requires automatic reversal on collateral review. Schreiber is incorrect. Under federal law, Schreiber would not be able to seek review of this unpreserved assignment of error under the plain error test, and the closure could be deemed de minimis, thus not requiring reversal.

Plain error is the federal equivalent of RAP 2.5(a), and allows a court to sometimes review an unpreserved error. *See* Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").
Under federal case law even structural errors must be preserved in federal court. *United States v. Marcus*, 560 U.S. 258, 130 S. Ct. 2159, 2164-66, 176 L. Ed. 2d 1012 (2010) (discussing structural error in relationship to "plain error" review of unpreserved claims); *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (open question whether structural errors always satisfy third prong of "plain error" test but still must meet fourth prong); *Johnson v. United States*, 520 U.S. 461, 469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (noting that even if error

was "structural" such that it "affected substantial rights," the error had not been preserved because it failed the fourth prong of the "plain error" test, i.e., any error did not "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.").[1]

Plain error analysis under Fed. R. Crim. P. 52(b) is a four-part test, rather than a three part test as in RAP 2.5(a). Plain error analysis under Fed. R. Crim. P. 52(b) requires a party to show (1) error, (2) that is plain, and (3) that affects substantial rights. If all three steps are met, the court decides whether to exercise discretion to review the question, considering whether (4) failure to note the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Johnson v. United States,* 520 U.S. 461, 466-67, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (conviction affirmed in spite of judicial finding on element of "materiality" where defendant failed to object); United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002) (aggravated sentence based on judicial finding of drug amount affirmed where no objection was lodged to judicial finding).

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[1] There is no independent Washington State law on structural error. The term first appeared in a Washington case in 1998, citing federal law. *Matter of Personal Restraint of Benn,* 134 Wn.2d 868, 952 P.2d 1166 (1998). Thus, it cannot be said that Washington courts have any tradition of applying a different preservation of error rule to structural errors.

In *Johnson* and *Cotton*, the Supreme Court refused to grant relief to a defendant who failed to object to a judicial finding on an element (*Johnson*) or a sentencing enhancement (*Cotton*) because "even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 632-33. Further, the *Johnson* court explicitly rejected the argument that an error could be deemed structural without first undergoing the rigors of plain error analysis. *Johnson*, 520 U.S. at 465-66.

As noted in the State's supplemental response to this personal restraint petition, Schreiber consented to this momentary closure, was the predominant participant in it, and the exclusive beneficiary of it. Federal law is no friend to Schreiber. This closure was de minimis under federal law[2], and Schreiber is required, under federal law, to show that the closure affected his substantial rights and the closure *seriously affected* the fairness, integrity, or public reputation of the judicial proceedings. This fleeting closure was done to protect Schreiber--not the State, Schreiber. It was entirely to his benefit, as the State argued in its prior briefing here. Schreiber cannot credibly claim that the momentary questioning of these two jurors in chambers prejudiced him while at the same time acknowledging that no error would have occurred at all--much less

[2] The State refers this Court to its lengthy analysis of de minimis closure in both its original and supplemental reply to this personal restraint petition.

prejudicial error--had the trial court simply gone through the *Bone-Club* factors on the record. Schreiber has never claimed, for example, that this closure would not have been otherwise proper under *Bone-Club*. He only complains that the trial court didn't go through the factors on the record. If Schreiber is seriously contending that the de minimis closure seriously affected the fairness, integrity, or public reputation of the judiciary (when it was done to ensure *he* received a fair trial), it is difficult to imagine how the out-loud recitation of *Bone-Club* factors would somehow alleviate such a grievous state of affairs.[3]

In addition to his procedural default by failing to raise this issue at the trial court, Schreiber would not be entitled to relief under the federal constitution even if he *had* raised a claim of ineffective assistance of appellate counsel--which he didn't. In *Charboneau v. United States*, 702 F.3d 1132 (8th Cir., 2013), the Eighth Circuit held the defendant was not entitled to relief based on an erroneous courtroom closure where he claimed that his appellate counsel was ineffective in failing to raise the claim on direct appeal. This was so because the Eighth Circuit recognized

[3] Indeed, the numerous majority opinions from the Supreme Court over the last six years, as well as their remarks during oral argument, reflect an intent to both punish trial courts and deter them from longstanding practices that often included partial, or sometimes full closures of the courtroom--done almost invariably to ensure that defendants received fair trials unmarred by jurors who withheld information during voir dire. The remarks and opinions don't reflect a serious concern that any one defendant suffered actual, identifiable prejudice from the trial court's failure to iterate the five *Bone-Club* factors on the record.

that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal," and because "we must assume that appellate counsel knew that...our review of a public trial claim on direct appeal would be for plain error." *Charboneau* at 1136, 1138. Schreiber is not entitled to relief under federal law.

C. CONCLUSION

Schreiber's public trial violation claim fails for the reasons set forth in this brief, as well as the arguments set forth by the State in its two prior briefs in this case.

DATED this 9th day of February, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Anne M. Cruser
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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